IN THE

Supreme Court of the United States

October Term, 1944

No. .....

EMANUEL MAX COHEN and ALBERT CHARLES SCHNEE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the United States Supreme Court, and to the Honorable Associate Justices Thereof:

I.

The Ninth Circuit Court of Appeals Erred in Holding That Local Selective Service Board No. 199 Had Any Jurisdiction of James L. Sartor After He Had Been Inducted Into the Armed Services; Without Such Jurisdiction No Offense Was Committed.

Selective Training Civil Service Act of September 16, 1944, as amended;

54 Stat. 885 C-720, 50 U. S. C. A. Appx. section 301 *et seq.*

II.

The Ninth Circuit Court of Appeals Erred in Taking Into Consideration on Rehearing Secret Directives of the Selective Service Director Entitled "Local Board Memorandum No. 80" Issued January 10, 1942, and "Memoranda or Directives to State Directors No. I-415" Dated April 17, 1942, and "No. I-423" Dated May 18, 1942, and "State Director Advice No. 204" Dated May 8, 1943.

None of these directives was introduced in evidence in the trial of the case. No witnesses testified to them and no witnesses were made available to the defendants who could testify that there were other directives that might have changed, altered or supplmented these directives or whether any of them ever reached Local Board 199, or that it ever had cognizance of them or were acting under any so-called directives. None of these directives appear in the Federal Register. It was therefore error for the Circuit Court to consider them on the appeal of the case.

In its petition for rehearing the Government cited for the first time various directives which it is claimed were issued by Selective Service. (Appellee's Petition pp. 10-13.)

The jurisdiction of the Circuit Court of Appeals is strictly appellate. (Title 28, Sec. 225, U. S. C.) In the absence of consent or stipulation of the defendants that court was without power or authority to consider these directives in reaching its decision.

It is respectfully submitted, therefore, that the Circuit Court erred in taking cognizance of these so-called directives.

In *Edwards v. U. S.*, 312 U. S. 473, 480; 85 L. Ed. 957, 963, the court said:

> "The government introduced in the Court of Appeals a purported transcript. . . .
>
> "Finally, the government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and that actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a part of the records of the agency. The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX."

The directives first produced by appellee on its petition for rehearing were no part of the record below. No witness testified to them. Their existence rests in the secret files of the military organization. There may be many others that may change or alter their tenor. Appellants had no opportunity to examine or cross-examine the witness who produced them; neither the court nor jury below, nor the Circuit Court, had the benefit of such examination and cross-examination.

As said in the *Edwards* case, 312 U. S. at 482:

> "The parties must be given an opportunity to plead and prove their contentions or else the impressions of the judge arising from sources outside the record

> dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

That the Government thought its own case was inadequate in the trial court is shown by the fact that it chose to produce new evidence in the form of these directives in the Circuit Court of Appeals. That the Circuit Court thought the case below was inadequate is shown by the fact that in that court the judgment was reversed until this new evidence in the form of directives was presented there.

The case should therefore be reversed, so that upon a new trial both sides may elicit all the directives and proceedings by adequate testimony "tested by cross-examination" of witnesses, and so that the case may not be decided "from sources outside the record."

See also *Burke v. Tregre*, 22 L. Ed. 158, 159, 19 Wall. 519, 526, wherein it was said by this court:

> "It may be that the courts of the country would take judicial notice that Louisiana, at the time mentioned, was in the military occupation of our forces, under General Banks, but we know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him."

The Federal Register Act, Title 44, sections 305, 307, provides that judicial notice may be taken of rules and regulations published in the federal register. These directives are not among the rules and regulations published in the federal register. Under the rule of *inclusio unis exclusio alterius* the directives not published are not to be given judicial notice.

III.

The Ninth Circuit Court Erred in Extending the Scope of the Directives Beyond Their Plain Language Assuming That It Has Jurisdiction to Do so, in Applying Such Directives to Local Draft Boards, Not Specified in the Directives.

Regulation I-415, dated April 17, 1942, is directed to all *state directors*. Nothing is said in the regulation regarding *local boards*, and nothing is said therein regarding appeal agents. The conclusion of the Circuit Court rests on sheer conjecture, and extends the words "state directors" to include "local draft boards."

The situation is comparable to that of employers of persons inducted into the service who are asked for recommendations, or where the Red Cross or social service organizations are asked for them. But these recommendations do not make the persons who are asked for them liable as acting as officers of the United States.

The regulation dated May 8, 1943, which the Government offered on rehearing, was a month and two days after the date of the alleged conspiracy, which was March 6, 1943. But even in that regulation the responsibility is placed upon the state director, not upon any local boards.

The Circuit Court of Appeals substituted the words "local board" and "appeal agent" for the words "state director," even in the directive. Thus it is respectfully submitted that the Circuit Court superimposed and added words in the directive for the purpose of establishing a crime, and that the construction thus given the statute and memoranda is a strained construction.

Since Sartor became a soldier, subject to the exclusive jurisdiction of the Army, the power of the selective service board had ended. This is shown by the action of the Army in granting furloughs.

Another fact that we think the Circuit Court overlooked in its affirmation of the judgment is that Cohen at no time made a recommendation to the board. All of his acts in behalf of Sartor were *prior* to March 6, 1943, the date of the commencing of the alleged conspiracy. He had written and sent a letter, it is true, but prior to that date. He had done all that he thought was within his power to aid Sartor prior to that date.

Harry H. Harrison, a member of Local Draft Board 199, said that on March 6, 1943, when the board had a meeting, the matter of Sartor was presented to the board and Cohen said to the board members that he "was going to submit the case to us without recommendation as to Private Sartor" [R. 182]. "Cohen said, 'It's up to you gentlemen, but it's much better if a man goes into the service not feeling resentful about anything.' That is all he said about the mental attitude of Mr. Sartor. He submitted it to us for recommendation. He didn't urge us to grant it or not grant it." [R. 185.]

This testimony negatives any evidence of acting for money to influence his official action, or his acting at all.

This court has held that a crime cannot be built up by strained construction and inferences beyond the scope of the statute. (*Pierce v. U. S.*, 314 U. S. 306, 86 L. Ed. 226; *Viereck v. U. S.*, 318 U. S. 253, 87 L. Ed. 734; *Ex parte McNulty*, 77 Cal. 164.)

In *Viereck v. United States* the Supreme Court of the United States had before it, in war time, the prosecution of a German propagandist actively engaged by an alien enemy. The court held that one may be subjected to punishment for crime in federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority, and then, only if punishment is authorized by Congress. The court refused to read language into the act which the Government urged it to do.

In its first decision the Circuit Court of Appeals said:

> "We express no opinion as to the official status of the local draft board's action in the instant situation. However, even assuming the draft board had jurisdiction, we believe that Cohen had none. The Selective Service Regulations in effect during the period herein involved provide for the appointment of a government appeal agent and outline his duties. They show that his sole function is to aid registrants under the Selective Service Act through the medium of appeals with respect to their classification by the local board . He is in the nature of an attorney whose services are rendered without charge to registrants in appealing their classifications. He has no function outside the field of draft classification and within that field his duties are limited to those of counsel on appeal.

"In the instant case Sartor had been inducted into the army several months before he requested his draft board to recommend an extension of his furlough. The problem of his classification under the Selective Service Act had long before been finally settled. Under the Act of its Regulations a government appeal agent has no possible official duty in connection with an inductee or with any matter pertaining to a furlough of one already in the army. Therefore, he was not 'an officer of the United States or a person acting for or on behalf of the United States in any official capacity' nor could he in the circumstances 'ask * * * money * * * with intent to have his * * * action on any * * * matter which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby.'

"Appellant Cohen, then, could not have committed an offense against the United States under sec. 207, Title 18 USCA, as charged herein, and neither he nor appellant Schnee could have conspired to commit such an offense. See United States v. Furer (DC Cal.), 47 Fed. Supp. 402, 405; United States v. Boyer (DC Mo.), 85 Fed. 425, 426; United States v. Gibson (DC Ill.), 47 Fed. 833, 834. In every case cited by the government to the contrary there was some semblance of authority, which is entirely missing here, for the act concerning which the bribe was asked or given.

"Our conclusion herein is supported by the reasoning of a recent decision of the Supreme Court, Billings v. Truesdell, March 27, 1944, wherein the court differentiated carefully between the jurisdiction of civil and military authorities over those selected under the Selective Service Act.

"Since the case must be reversed upon the points hereinabove treated, we do not treat of other points urged by the defendant as cause for reversal."

In its second decision the Circuit Court said, using somewhat the same language, but adding the directives:

"We have not been able to find in the Selective Service Act or in the regulations promulgated thereunder any provision specifically authorizing the local draft board or its appeal agent to recommend furlough extensions for one already inducted into the army; we have found nothing vesting in the board or its appeal agent any jurisdiction at all over an inductee. Unquestionably, one actually inducted is subject to military jurisdiction. Billings v. Truesdell, 321 U. S. 542. However, with respect to a furlough extension such as that requested by Sartor it is the policy and practice of the military authorities to require a recommendation of the extension by the local draft board of the applicant. According to the testimony of an army liaison officer, to follow any other procedure would in effect 'nullify the procedure of the Selective Service System in ordering a man in, so we make it a rule.'

"That local boards habitually have performed duties in connection with inductees is evident from various memoranda issued by the National Headquarters of the Selective Service System. Local Board Memorandum No. 80, issued January 10, 1942, discusses separation of inducted men from active military service and their transfer to the Enlisted Reserve. It reveals a duty of cooperation between civil and military authorities: 'After a man has been inducted into military service he passes into military control and questions concerning his retention in or separation from active service are responsibilities of the War Department. All final determinations must be made by the military authorities and it is the expressed intention and desire of the War Department that such determinations be made in accordance with the facts presented and in the best interests of all concerned. *It is the function of all elements of Selective Service, when called upon through proper channels, to assist the War Department with information and recommendation consistent with the facts.*'" (Emphasis added.)

But there is nothing in the Selective Service Act that gives the local board any such jurisdiction as the Circuit Court finally interprets.

This court has held that the jurisdiction of local boards ends when the inductee is inducted into the service. (*Billings v. Truesdell*, 321 U. S. 542.) The decision of the Circuit Court is in conflict with this decision.

IV.

The Circuit Court of Appeals Erred in Holding That Even if the Local Board Had Jurisdiction the Government Appeal Agent Had Any Jurisdiction.

The appeal agent's duties are expressly set forth in the regulations (section 603.71) which says, "For each local board a government appeal agent shall be appointed. The duties of the person so designated are . . . after classification to investigate and report upon matters which are submitted for his investigation by the local board."

The work of the appeal agent, of course, is to handle appeals from local classifications. His work obviously ceases in his official capacity when the inductee, following all appeals, has finally been inducted into the service. It would be a very strained construction to give the local appeal agent any other power or authority. The statute and regulations give him none. It is only by stretching the act beyond its plain language that the court has been able to confirm the conviction in this case.

V.

The Circuit Court of Appeals Erred in Holding That There Had Been a Conspiracy to Ask a Bribe With Intent to Influence Cohen's Official Action, Since Sartor Had Already Been Granted an Additional Furlough by the Military Authorities a Day or Two Before March 6, 1943, Which Precluded Any Conspiracy to Influence Cohen's Official Action, as the Matter for Which the Official Action Was Allegedly Sought Had Already Been Accomplished.

It is impossible for an officer to violate section 207, Title 18 U. S. C. A., by asking for money with intent that

it influence him in a matter which is not before him officially.

Gunning v. People, 59 N. E. 494 (Ill.);

Commonwealth v. Reese, 29 S. W. 352;

State v. Butler, 77 S. W. 560;

In re Yee Gee, 83 Fed. 145;

Benson v. United States, 27 App. (D. C.) 331.

It is elementary that if the acts sought to be induced by bribery are foreign to the duties of the officer involved the officer has not the capacity to commit the offense of seeking a bribe in relation to such acts.

Pierce v. United States, 314 U. S. 306, 86 L. Ed. 226;

United States v. Gibson, 47 Fed. 833;

United States v. Boyer, 85 Fed. 425;

Gunning v. People, 59 N. E. 494 (Ill.);

State v. Butler, 77 S. W. 560.

Appellant Schnee had no official capacity whatsoever, and it is not asserted that he was in any manner acting under or by virtue of any authority delegated to him by the Government.

If Schnee could not be a principal Cohen could not be an aider or abettor or a conspirator with one who could not be a principal. (*United States v. Falcone*, 109 Fed. (2d) 579.)

VI.

The Circuit Court Erred in Upholding the Admission Into Evidence of Conversations Had With Appellant Schnee After Schnee's Arrest on March 6, 1943, at the Studio of 20th Century-Fox, Which Conversations Were Participated in by Three Government Witnesses and Appellant Schnee in the Absence of Appellant Cohen. [R. 130-133, testimony of John E. Barr; R. 117-123, testimony of Thomas W. Donovan; R. 149-151, testimony of Harry Marvin Popkin.]

> "If the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts are not admissible against the others." (*Logan v. United States*, 144 U. S. 263, 309.)

During the trial the Government produced in its case in chief, three witnesses, who were present at a conversation on the afternoon of March 6, 1943, at the studio of 20th Century-Fox Film Studio, which conversation was held and participated in as between the three Government witnesses and Schnee, as set forth in the above paragraph. Appellant Cohen was not present on this occasion.

Government's witness Donovan was a police officer [R. 112, testimony of Donovan].

Upon the arrival of the three Government witnesses, Barr, Donovan and Popkin at the studio, they confronted appellant Schnee, who was an employee there, and Donovan informed Schnee that he, Schnee, was under arrest on an extortion charge [R. 132, testimony of Government's witness John E. Barr].

The three Government's witnesses then engaged Schnee in conversation and jointly interrogated him concerning his prior actions and declarations relating to his transaction involving the arrangement for Sartor (the person from whom the appellants were charged with soliciting a bribe) to deliver bribe money to appellant Schnee through the medium of Government's witness Harry Marvin Popkin, and they also questioned Schnee as to his prior actions in relation to appellant Cohen.

As the record discloses in the case of each witness, appellant Cohen specifically objected to the introduction of this evidence on the first ground that the same called for hearsay testimony as against appellant Cohen, and was incompetent, and on the second ground that it called for the declaration of his co-conspirator Schnee, made after the object of the conspiracy had terminated.

The trial judge in the instance of each witness overruled the objection and allowed evidence of the conversation and Schnee's replies to the interrogations to be received. The appellant's duly excepted to the court's ruling. At the conclusion of the Government's case appellant Cohen moved to strike this testimony from the evidence, which motions were denied and duly excepted to. [For motion to strike this testimony of Government's witness Barr see R. pp. 200, 201; for that of Government's witness Donovan see R. pp. 198 and 199; and for that of Government's witness Popkin see R. p. 200.]

A summary of the testimony of the three witnesses allowed into evidence is here set forth:

Donovan said Schnee admitted he talked with Popkin shortly before Donovan arrived at the studio. Appellant Schnee denied he had talked to Popkin at an earlier hour that day. Donovan stated Barr asked Schnee when he had last seen appellant Cohen, and Schnee said he had either seen Mr. Cohen or talked with him on the telephone that morning (March 6, 1943) [R. 122-123, testimony of Donovan].

Barr stated that Popkin asked appellant Schnee if he remembered calling him earlier in the day about an envelope a man named Sartor was to deliver to Popkin at 2:15 p. m. and Schnee replied he did not know what Popkin was talking about. Barr stated that Schnee told him he had seen Cohen in the morning (March 6, 1943) about an income tax matter [R. 132, testimony of Government's witness Barr].

Popkin testified that appellant Schnee declared to Officer Donovan that he had not talked with Popkin on the telephone at all on the day in question (March 6, 1943), and that Schnee denied he had requested Popkin to receive an envelope for him. Popkin further recited that appellant Schnee declared he knew appellant Cohen but he had not seen Cohen that day (March 6, 1943) [R. 150-151, testimony of Popkin].

The prejudice of allowing appellant Schnee's asserted statements, made at a time when he was under arrest, to

be admitted into evidence against appellant Cohen rests upon the proposition that the statements of Schnee were all conradicted by a preponderance of testimony furnished by Government's witness [R. 174, testimony of Alice Pettus; R. 173, testimony of John Okey; R. 167, testimony of Ruth Brown; R. 142-147, testimony of Harry Popkin].

These extra-judicial statements supported an inference of a consciousness of guilt on the part of a person alleged and contended to be appellant Cohen's co-conspirator. In other words, the false statements and declarations of appellant Schnee were matters that were allowed to militate against appellant Cohen.

The competent evidence, as is pointed out in summary of the evidence, which tends to establish the existence of a conspiracy between appellants, is meager and the error is therefore aggravated by this circumstance. The authorities are unanimous that the extra-judicial statements of a co-conspirator made after the termination of the conspiracy, are not admissible against a defendant such as Cohen, not present at the time the same were uttered.

It is self-evident that the asserted declarations of appellant Schnee made after he had been placed under arrest by Officer Donovan, were not made in furtherance of the objects of the conspiracy. The conspiracy had terminated in frustration when the bribe money was taken from the intermediary (Popkin) and the co-conspirator Schnee was placed under arrest.

VII.

The Circuit Court of Appeals Erred in Holding That There Was No Error Committed in Admitting Into Evidence Statements Taken From Appellant Schnee Following His Arrest and While He Was Held in the Custody of a Los Angeles Police Officer, an Agent of the F. B. I., and in Holding in Particular That It Was Not Error to Admit Before the Jury the Fact of Refusal by Schnee to Sign a Statement for the F. B. I.

Such refusal on the part of Schnee was merely a statement that he was standing on his constitutional rights.

In *Johnson v. United States,* 318 U. S. 189, this court said:

> "But where the claim of privilege is asserted and unqualifiedly granted the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (Wilson v. United States, 149 U. S. 60, 37 L. Ed. 650) is then applicable. As said by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness is allowed the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inference whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice if either party is to be affected injuriously by it.' "

The evidence which the Government offered as against Schnee regarding his refusal to sign a statement at the F. B. I. was placed before the jury for the purpose of in-

juring him and must be presumed to have accomplished that purpose. If a defendant in custody cannot decline to sign a statement for the F. B. I. without that fact being used against him in a criminal trial, then his constitutional privileges guaranteed by the Fifth Amendment to the Constitution of the United States become valueless.

VIII.

The Circuit Court of Appeals Erred in Permitting the Statements at the Police Station and the Proceeding Had With Schnee While He Was Being Held in Custody of the F. B. I. and Before Any Arraignment, and While He Was Denied the Right to See His Counsel, to Go Before the Jury. It Was Properly No Part of the Trial.

It is submitted that these proceedings prohibited the use of any statements made by Schnee while thus held in custody, and which were presented to the jury for the purpose of affecting the appellants adversely. (Sec. 300(a), Title 5 and Sec. 395, Title 18, U. S. C. A.; *McNabb v. United States,* 318 U. S. 332; *Anderson v. United States,* 318 U. S. 350; *Gros v. United States,* 136 Fed. (2d) 878.)

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners and Appellants.

State of California, County of Los Angeles—ss.

Morris Lavine, being first duly sworn, upon his oath deposes and says: that he is the attorney for petitioners herein, Emanuel Max Cohen and Albert Charles Schnee; that he has read the foregoing Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals of the United States and Brief in Support Thereof, and knows well the contents; that he has carefully read and studied the transcript of record and proceedings in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record and proceedings, and that he verily believes the facts stated in said petition are true.

MORRIS LAVINE.

Subscribed and sworn to before me this 28th day of November, 1944.

CHAS. B. HAZLEHURST,
Notary Public in and for said County and State.